Supreme Court, U.S.
FILED
AUG 13 2007
OFFICE OF THE CLERK

No. 07-198

IN THE

Supreme Court of the United States

EMCON/OWT, INC.,

Petitioner,

v.

SECRETARY OF LABOR and OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CARL B. CARRUTH
McNAIR LAW FIRM, P.A.
1301 Gervais Street
Suite 1800
Columbia, SC 29201
(803) 799-9800

Counsel for Petitioner

210336

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. What is the proper standard of review in this case on the questions relevant to the ALJ's determination that the employer reasonably could have anticipated the hazardous atmosphere and was not reasonably diligent?

2. Did the Administrative Law Judge (ALJ) err in interpreting 29 C.F.R. § 1926.651(k)(1) so as to require that a crew of employees working in an excavation approximately two and one-half feet deep be under the constant and continuous direct supervision of a "competent person" within the meaning of said standard regardless of whether their exposure to hazardous conditions is reasonably anticipatable in light of OSHA's published interpretation that said standard does not require the competent person to remain onsite for the entire workday?

3. Can an employer be found to have knowledge of an alleged hazardous condition within the meaning of 29 U.S.C.§ 666(k) where the knowledge imputed to the employer is only learned by the supervisor seconds before the supervisor loses consciousness, thus making it impossible for the supervisor to take any remedial action?

4. Can an employer who provides a supervisor [who is capable of identifying existing and predictable hazards in the surroundings or working conditions and who has the authority to take prompt corrective measures to elements eliminate such hazards] to supervise the work and working conditions of a crew of four employees be found to be less than reasonably diligent within the meaning of 29 U.S.C. § 666(k) if the employer fails to provide an acting or substitute supervisor who is also capable of identifying

existing and predictable hazards when the first said supervisor leaves the work area for 30-45 minutes to perform a job related task immediately after conducting an inspection of the work area and determining that no existing hazards are present in the work area and that employees will not be exposed to any predictable or reasonably anticipatable or foreseeable hazards during his absence?

5. Were the ALJ's factual findings supported by substantial evidence on the record considered as a whole?

LIST OF PARTIES

The caption of the case contains the names of all the parties to the proceedings in the court below. The Occupational Safety and Health Review Commission chose not to participate.

CORPORATE DISCLOSURE STATEMENT

EMCON/OWT, Inc. is a wholly owned subsidiary of its parent corporation, The Shaw Group, Inc., a publicly traded corporation. No parent corporation or publicly held corporation owns ten percent (10%) or more of The Shaw Group, Inc.'s stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF CITED AUTHORITIES	vii
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	13
I. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH THE HOLDINGS OF OTHER CIRCUITS ON THE IMPORTANT QUESTION OF THE APPROPRIATE STANDARD OF REVIEW FOR MIXED QUESTIONS OF FACT AND LAW	13

Contents

Page

II. THE ELEVENTH CIRCUIT IMPROPERLY DEFERRED TO THE ALJ'S DECISION WHICH IGNORED OSHA'S REASONABLE PUBLISHED INTERPRETATION OF THE STANDARD AT ISSUE AND ADOPTED HER OWN UNREASONABLE INTERPRETATION OF THE EMPLOYER'S DUTY CONTRARY TO A PRIOR DECISION OF THIS COURT. 15

III. THE ELEVENTH CIRCUIT IMPROPERLY DEFERRED TO THE ALJ'S DETERMINATION THAT THE ATMOSPHERIC HAZARD COULD HAVE BEEN REASONABLY ANTICIPATED 20

IV. THE ELEVENTH CIRCUIT IMPROPERLY DEFERRED TO THE ALJ'S DETERMINATION THAT EMCON HAD KNOWLEDGE OF THE PRESENCE OF THE ALLEGED VIOLATION 23

CONCLUSION 26

Contents

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed March 13, 2007 ..... 1a

Appendix B — Decision And Order Of The United States Of America Occupational Safety And Health Review Commission Docketed December 15, 2005 ..... 4a

Appendix C — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Filed May 14, 2007 .... 23a

Appendix D — Relevant Codes Of Federal Regulation 25a

TABLE OF CITED AUTHORITIES

CASES *Page*

Atlantic & Gulf Stevedores, Inc. v. OSHRC,
534 F.2d 541 (3rd Cir. 1976) 14

Atlas Roofing Co. v. OSHRC,
518 F.2d 990 (5th Cir. 1975),
aff'd on other grounds, 430 U.S. 442 (1977) ... 13

Bonner v. Pritchard,
661 F.2d 1206 (11th Cir. 1981) 13

Brennan v. Occupational Safety & Health Review Com.,
511 F.2d 1139 (9th Cir. 1975) 23

Carlisle Equip. Co. v. United States Secretary of Labor,
24 F.3d 790 (6th Cir. 1994) 23

Dunlop v. Rockwell International,
540 F.2d 1283 (6th Cir. 1976) 13

Electric Smith, Inc. v. Secretary of Labor,
666 F.2d 1267 (9th Cir. 1982) 13

Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Com.,
528 F.2d 564 (5th Cir. 1976) 23

Cited Authorities

	Page
Martin v. OSHRC (CF&I Steel Corp.), 499 U.S. 144 (1991)	19
Martin v. OSHRC (Milliken & Company), 947 F.2d 1483 (11th Cir. 1991)	13
New England Tel. & Tel. Co. v. Secretary of Labor, 589 F.2d 81 (1st Cir. 1978)	21
New York State Elec. & Gas Corp. v. Secretary of Labor, 88 F.3d 98 (2d Cir. 1996)	19
Puerto Rico Aqueduct & Sewer Auth. v. United States EPA, 35 F.3d 600 (1st Cir. 1994)	14
Secretary of Labor v. Daniel Construction Co., 10 O.S.H. Cas. (BNA) 1254 (OSHRC No. 80-1224, 1981)	25
Secretary of Labor v. EMCON/OWT, Inc., 2006 WL 168534 (O.S.H.R.C.)	1
Secretary of Labor v. EMCON/OWT, Inc., 21 O.S.H. Cas. (BNA) 1498	1
Secretary of Labor v. EMCON/OWT, Inc., O.S.H. Dec. (CCH) ¶ 32,884	1

Page

Secretary of Labor v. Pride Oil Well Service, 15 O.S.H. Cas. (BNA) 1809 (OSHRC No. 87-692, 1992) 23

Secretary of Labor v. Southwestern Bell Tel. Co., 19 O.S.H. Cas. (BNA) 1097, 1098 (OSHRC No. 98-1748, 2000) 23

Secretary of Labor v. Williams Enterprise, Inc., 10 O.S.H. Cas. (BNA) 1260 (OSHRC No. 16184, 1981) 25

STATUTES AND REGULATIONS

5 U.S.C. § 706 15

5 U.S.C. § 706(2)(A) 2, 14, 20, 22, 25

28 U.S.C. § 1254(1) 1

29 U.S.C. § 658 12

29 U.S.C. § 659(c) 12

29 U.S.C. § 660(a) 12, 15

29 U.S.C. § 661(j) 1, 12

29 U.S.C. § 666(k) ..... i, 2, 15, 23

Cited Authorities

	Page
29 C.F.R. § 1926.650(a)	3
29 C.F.R. § 1926.650(b)	3, 16
29 C.F.R. § 1926.651(k)	3
29 C.F.R. § 1926.651(k)(1)	i, 3, 6, 10, 15, 16

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished. The Eleventh Circuit affirmed the order and decision of the Occupational Safety and Health Review Commission Administrative Law Judge (ALJ), which had become a final order of said Commission pursuant to 29 U.S.C. § 661(j). *See* Appendix B. The Commission no longer designates an official reporter of its decisions but publishes all ALJ and full Commission decisions on its website. The ALJ's decision and order in this case is published by the Commission on its website at HTTP://WWW.OSHRC.Gov/Decisions/HTML_2006/04-1406.HTML. Said decision is also published unofficially at *Secretary of Labor v. EMCON/OWT, Inc.*, 2006 WL 168534 (O.S.H.R.C.) and in digest form at *Secretary of Labor v. EMCON/OWT, Inc.*, 21 O.S.H. Cas. (BNA) 1498 and at *Secretary of Labor v. EMCON/OWT, Inc.*, O.S.H. Dec. (CCH) ¶ 32,884.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on March 13, 2007. *See* Appendix A. Petitioner filed a timely Petition for Panel Rehearing on April 27, 2007. The Petition for Panel Rehearing was denied by ordered entered on May 14, 2007. *See* Appendix C.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory provisions are:

(1) TITLE 29 UNITED STATES CODE, SECTION 666(k), which provides as follows:

> DETERMINATION OF SERIOUS VIOLATION
>
> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(2) TITLE 5 UNITED STATES CODE, SECTION 706(2)(A), which provides as follows:

> SCOPE OF REVIEW
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . .

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwi ≥ not in accordance with law;

The relevant regulatory provisions are set forth at 29 C.F.R. § 1926.650(a) and (b), and § 1926.651(k), which are reproduced at Appendix D.

The standard allegedly violated is: 29 C.F.R. § 1926.651(k)(1), which provides as follows:

> Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

STATEMENT OF THE CASE

EMCON is a construction company that constructs solid waste landfills, installs landfill gas collection systems and landfill leachate management systems throughout the United States. In 2004, EMCON was engaged in the expansion of the gas collection system at the Okeechobee Landfill at Okeechobee, Florida.

The landfill was constructed in 10-acre cells. The bottom of each cell was V-shaped with a two degree slope sloping downward from each side to the lowest part of the V in the center. The notch or bottom of the V also sloped downward as it ran from north to south with a two-degree slope. The bottom of each cell was lined with a high density polyethylene (HDPE) lining system. Running south to north at the bottom of the V was a perforated eight-inch diameter leachate collection pipe. The leachate collection pipe was covered with a three-foot layer of stone aggregate which acted as a French drain. A layer of fabric was placed over the stone aggregate and then a two-foot thick protective layer of sand was placed on top of the fabric. The solid waste (garbage) was then placed over the fabric in the cell in layers of garbage and soil.

Because rainwater falling on the landfill leaches down through the layers of garbage. The water, known as "leachate," must be contained and treated before it is allowed to enter the groundwater. The purpose of the HDPE liner is to contain the leachate. The purpose of the leachate collection pipe is to collect the leachate and transport it to a treatment pond. At the north end of the leachate collection pipe was a sump pump that pumped the leachate water out of the collection pipe and up a non-perforated riser to a force main

and the treatment pond. The south end of the leachate collection pipe was connected to the non-perforated leachate cleanout pipe which angled upward to just above ground level on the south side and just outside of the landfill.

Over time, the garbage deposited into the landfill begins to decay. The decaying process generates methane gas. Methane gas is odorless and lighter than air. Because it is lighter than air, it rises up through the landfill and will enter the atmosphere if not captured. Environmental regulations require that gas collection systems must be installed to capture the methane gas.

To accomplish this, gas wells were drilled into the landfill. The wells were connected to a large pipe called a "header." The header ran around the perimeter of the landfill, on the surface, to a flare which burned the gas to dispose of it. A large fan in the system put the entire system under negative pressure, thus pulling the methane out of the landfill at each of the wells.

The methane gas created in the landfill is moist. As it is pulled through the header the moisture condenses. This condensate must be removed from the header, so condensate drain lines, or "drip legs," are installed at various low points in the header to drain the condensate water. The condensate drain lines are connected to the leachate cleanout pipe so that the condensate water will drain into the leachate collection pipe.

Because methane is lighter than air, it rises up through the landfill and does not travel downward through the layers of sand and aggregate to enter the leachate collection pipe. A very small minimal trace amount of methane may be

created inside the leachate collection pipe as a result of the deterioration of the leachate water before it is pumped out, but the amount of methane gas formed in the leachate collection pipe is insignificant and not enough to create a hazard.

On the morning of the alleged violation, February 19, 2004, a crew of four EMCON employees was working at the Okeechobee Landfill to connect (tie-in) a condensate drain line to the leachate cleanout pipe. The crew consisted of Superintendent Meier and crew members Warne, Diloreti, Seaborn, and Garno. Because the connection was to be made slightly under the surface of the ground, this involved removing the top layer of soil until the portion of the leachate cleanout pipe approximately two feet below the surface was exposed. Then the leachate cleanout pipe was to be cut and the tie-in made. Three saws were available to the crew for cutting through the pipe — a gasoline powered chainsaw, an electric reciprocating saw called a "Saws-All" and a hand saw. The chainsaw was the preferred saw. The connection of a condensate line to a leachate cleanout pipe was routine work which had been performed by this crew many times.

Superintendent Meier was the competent person designated by EMCON to conduct safety inspections of the excavation and the workplace in general pursuant to 29 C.F.R. § 1926.651(k)(1). Meier was also the supervisor directly over the crew. Meier's qualifications as a competent person were not disputed.

The first thing Meier did when he arrived at work on the morning of February 19, 2004, was inspect the work area where his crew would be working to connect the condensate drain line to the leachate cleanout pipe. He inspected the

excavation and did not observe any hazardous conditions. He did not anticipate that any kind of atmospheric hazard could be created by cutting into the leachate pipe. Leachate pipes were not supposed to contain a significant amount of methane gas and in all of his years of experience he had never heard of a leachate pipe releasing enough methane gas to create any kind of a hazard when the pipe was cut. It is undisputed that Meier could not have reasonably anticipated that an atmospheric hazard would develop when the pipe was cut.

Upon completing his inspection, he met with his crew and conducted a brief safety meeting. He gave the crew their work assignments for the morning and left the site to purchase fuel for the generators, putting Diloreti in charge as "acting foreman." He was only gone from the site for approximately 30-45 minutes.

After Meier left, the crew went to the work area and Seaborn began cutting the leachate cleanout pipe with the chainsaw. The excavation at the point where the cut was made was only 12-30 inches deep. As soon as Seaborn made the initial cut, there was a release of an unpleasant odor. About the same time, the chainsaw quit working. Unpleasant odors are common at landfills and are commonly emitted when leachate cleanout pipes are cut. Chainsaws quit working for all kinds of reasons. Why the chainsaw stopped working on this occasion is unknown and was never proven. Seaborn's attempts to restart the chainsaw were unsuccessful, so Diloreti sent Seaborn to get the Saws-All, an electrical extension cord and the handsaw. While these tools were being obtained, the remainder of the crew took a break and performed no work. When Seaborn returned with the tools approximately 15-20 minutes later, the crew went back to work.

Judge Spies found the following relevant facts:

> Meier left the site to get gas and supplies, leaving Troy Diloreti as acting foreman. Seaborn, using a gasoline powered chainsaw, cut the pipe. The pipe released an odorous gas and the chainsaw stopped working. Seaborn exited the trench and went to the job trailer to retrieve a Saws-All electric saw. He was gone for 15-20 minutes. When he returned, he re-entered the trench. Instead of cutting the pipe, Seaborn commented on the foul odor and again exited the trench. Diloreti then entered the trench prepared to make the cut, but he too stopped short and commented on the odor. Warne expressed impatience with his co-workers and entered the trench. He bent down to cut the pipe, but immediately stood up and said, "Whew." (TR. 77). Garno jumped into the trench, bent over the pipe, stood up, and said, "Something is not right." He then passed out. (TR. 77). Seaborn went to help Garno out of the trench. Diloreti looked at Warne and saw he was bleary-eyed and his legs were buckling. Diloreti went over to pull Warne out of the trench but passed out as he was doing so.

Appendix 8a.

When Meier returned to the jobsite, he found that his crew had been overcome while cutting the leachate cleanout pipe and that they were receiving emergency first aid prior to being transported to the hospital.

While there was some speculative testimony that the chainsaw could have stopped working because of a lack of sufficient oxygen in the atmosphere around the cut in the leachate pipe, it was never proven why the saw stopped working. The evidence established that chainsaws can stop working for many reasons and the reason this particular chainsaw stopped working on this particular occasion was unknown. Moreover, no evidence was introduced to establish that Diloreti even suspected a lack of oxygen. He testified that he did not know why the saw stopped.

The undisputed evidence established that unpleasant landfill odors are not an indication of a hazardous atmosphere. EMCON's undisputed competent person, Meier, testified regarding landfill odors in response to questioning by the ALJ as follows:

> . . . We have trenched in landfills prior to this where we were doing monitoring. We've had outrageous smells that would make you want to gag, but there would be no reading on the meters. There is nothing hazardous about it; it's just the nature of the business, the smells. I mean, you could go into a garbage can in your household that has set there for a few days, and it will reek, but there is really no hazardous gases.
>
> Judge Spies: So, it was more unpleasantness than a sign of danger to you?
>
> Meier: Yes.

(Hearing Transcript Vol. I, pp. 238-239)

It was undisputed that it was not reasonably foreseeable to find any significant amount of methane gas in a leachate pipe. It was undisputed that the methane gas formed in the landfill is generated by the decaying garbage which is above the leachate pipe and that because methane is lighter than air, the methane rises upward through the landfill and does not sink down to the level of the leachate pipe. It was undisputed that when Meier conducted his inspection of the work area prior to the start of work that morning, he could not have reasonably anticipated that cutting into the leachate cleanout pipe would release a significant amount of gas or that cutting into said pipe would be a hazard increasing occurrence. It was also undisputed that while landfill leachate water has a foul odor, methane gas is odorless. The only gas alleged to be present was methane. No evidence was offered to establish that any other gas was present or reasonably could be expected to be present.

Nevertheless, the ALJ concluded as follows:

> The hazard increasing occurrence in this instance was the cut made in the leachate pipe. The cut released some gas (the Secretary speculates it was methane, but this was never conclusively established) into the immediate atmosphere, causing irritation, and eventually asphyxiation, in the crew members. Section 1926.651(k)(1) requires an inspection "when employee exposure can be reasonably anticipated." Reasonable anticipation of employee exposure was raised by three incidents over a span of approximately 20 minutes: the gas chain-saw stopped, indicating a lack of oxygen in the atmosphere; a strong, unpleasant odor arose from the leachate pipe; and

> each crew member suffered immediate physical discomfort upon entering the excavation to make the second cut. These incidents were, all the witnesses agreed, unusual in their experience...

Appendix 18a.

It was undisputed that EMCON had no actual knowledge that an atmospheric hazard had developed. The ALJ found, however, that EMCON had constructive knowledge because she found that EMCON could have known of the hazard by the exercise of reasonable diligence. The ALJ concluded that EMCON was not reasonably diligent because EMCON did not train Diloreti, the employee left in charge of the crew in Meier's absence, to recognize potentially hazardous situations. She held that Diloreti was not a competent person within the meaning of the standard because EMCON had not adequately trained him. The ALJ held that Diloreti's knowledge of the fact that the chainsaw had stopped working, the unusually bad odor and the employee's reaction to the odor were imputed to EMCON.

It was undisputed that the Secretary had published an interpretation of the standard at issue clarifying that the employer's competent person was not required to remain on the jobsite during the entire work shift but could come and go as needed.

Notably, the ALJ did not hold that Diloreti had actual or constructive knowledge of any kind of physical discomfort experienced by any of the employees, other than their reaction to the unpleasant odor and the ALJ did not hold that such knowledge could be imputed to EMCON. Nor did she hold that prior to the events on February 19, the development of a

hazardous atmosphere as a result of cutting into a leachate cleanout pipe was reasonably foreseeable or that employee exposure to an atmospheric hazard could have been reasonably anticipated.

EMCON petitioned the Commission to grant discretionary review of the ALJ's decision and order, but review was not directed and pursuant to 29 U.S.C. § 661(j) the ALJ's decision and order because a final order of the Commission within the meaning of 29 U.S.C. § 659(c) on January 17, 2006. EMCON filed its petition for review with the United States Court of Appeals for the Eleventh Circuit on March 16, 2006, pursuant to 29 U.S.C. § 660(a). In the Court of Appeals, EMCON argued that the ALJ's decision was not supported by substantial evidence on the record considered as a whole, that employer knowledge had not been established as a matter of law, and that EMCON was not required by the Act or the standard cited to provide constant and continuous supervision over its employees by a person capable of identifying existing and predictable hazards in the surroundings in order to comply with the standard at issue or to be reasonably diligent.

The Eleventh Circuit denied EMCON's petition for review deferring to the ALJ's decision.

EMCON petitions this Court for review of the Eleventh Circuit's decision deferring to the decision of the ALJ and of the ALJ's decision affirming the alleged violation.

The basis for federal jurisdiction in the United States Court of Appeals was 29 U.S.C. § 660(a) as the result of a timely petition for review filed by EMCON seeking review of the final order of the Commission affirming item 3 of the Citation and Notification of Penalty issued to EMCON by the Secretary pursuant 29 U.S.C. § 658.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH THE HOLDINGS OF OTHER CIRCUITS ON THE IMPORTANT QUESTION OF THE APPROPRIATE STANDARD OF REVIEW FOR MIXED QUESTIONS OF FACT AND LAW

There is a split in the circuits on the important question of the proper standard of review which a court should apply when reviewing the Commission's determination of reasonableness with respect to reasonable diligence, reasonable foreseeability, and reasonable anticipation. This conflict on this important fundamental question of Federal law needs urgently to be resolved. In this case, the Eleventh Circuit presumably treated the determination of reasonableness as one of fact and reviewed the ALJ's determination only under the substantial evidence test in accordance with its decision in *Martin v. OSHRC (Milliken & Company)*, 947 F.2d 1483 (11th Cir. 1991), which followed the holding of *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1013 (5th Cir. 1975), aff'd on other grounds, 430 U.S. 442 (1977), which is considered to be binding precedent on the Eleventh Circuit pursuant to *Bonner v. Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981). *See also Dunlop v. Rockwell International*, 540 F.2d 1283, 1288 (6th Cir. 1976), which also holds that the determination of reasonable diligence is a question of fact to be reviewed under the substantial evidence standard.

Other circuits have decided this critical issue differently. In *Electric Smith, Inc. v. Secretary of Labor*, 666 F.2d 1267 (9th Cir. 1982), the court held that the determination of reasonableness is a mixed question of fact and law, but that

the factual findings were of limited importance as compared with the conclusion of law drawn from them. Thus, the court held, the standard for review of such mixed questions of law and fact should be the standard set forth at 5 U.S.C. § 706(2)(A) rather than the substantial evidence test. This holding of the Ninth Circuit is in direct conflict with the holdings of the Eleventh and Fifth and Sixth Circuits on this important question. In *Atlantic & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541 (3rd Cir. 1976), the court held that a determination as to reasonable predictability was an adjudicatory (legal) conclusion rather than factual and therefore subject to the test set forth at 5 U.S.C. § 706(2)(A) rather than the substantial evidence test. This holding by the Third Circuit is also in conflict with the holding of the Eleventh, Fifth and Sixth Circuits.

In *Puerto Rico Aqueduct & Sewer Auth. v. United States EPA*, 35 F.3d 600, 604 (1st Cir. 1994), the court held that mixed questions of fact and law did not fit automatically into the substantial evidence standard or the § 706(2)(A) standard, but held that the proper standard was a sliding degree-of-deference continuum based on the degree to which factual findings or legal conclusions dominated the determination.

Thus, the circuits are in direct and very real conflict on one of the most basic principles of judicial review of administrative agency decisions — the standard of review to be utilized by the Court. This conflict between the circuit courts of appeal urgently needs to be resolved.

EMCON contends that the issue of reasonableness is a mixed question of fact and law which is dominated by the legal conclusion and that therefore § 706(2)(A) is the proper standard of review.

Even assuming, *arguendo*, that the substantial evidence standard was the correct standard of review on the determinations of reasonable anticipation and reasonable diligence, in making these determinations the ALJ relied upon factual findings which were not supported by substantial evidence on the record considered as a whole.

Thus, in deferring to the ALJ's decision on these issues, the court erred and failed to provide the necessary judicial review mandated by 5 U.S.C. § 706 and 29 U.S.C. § 660(a).

II. THE ELEVENTH CIRCUIT IMPROPERLY DEFERRED TO THE ALJ'S DECISION WHICH IGNORED OSHA'S REASONABLE PUBLISHED INTERPRETATION OF THE STANDARD AT ISSUE AND ADOPTED HER OWN UNREASONABLE INTERPRETATION OF THE EMPLOYER'S DUTY CONTRARY TO A PRIOR DECISION OF THIS COURT

This case presents an important question regarding the degree of supervision an employer is required to provide over its workforce pursuant to 29 C.F.R. § 1926.651(k)(1) and its duty to be reasonably diligent pursuant to 29 U.S.C. § 666(k). This important federal question has never previously been decided by this Court. This Court's guidance is urgently needed because the ALJ's decision, to which the Eleventh Circuit deferred, would impose an extreme and unwarranted hardship on employers.

In this case, the ALJ, while acknowledging the Secretary's interpretation of the standard at issue, ignored said interpretation and essentially held that the standard and the employer's duty to supervise its workforce with

reasonable diligence required that an employer must provide continuous and constant supervision over its workplace by supervisors who were trained and qualified as competent persons within the meaning of said standard. In spite of the Secretary's interpretation, which specifically stated that said competent persons were not required to remain at the worksite during the entire work shift, the ALJ held that the absence of a competent person from the jobsite for only 30-45 minutes, even when the competent person did not, and could not, reasonably anticipate that the crew would be exposed to a hazard during his absence, constituted a violation of the standard and of the employer's duty to exercise reasonable diligence in supervising its workplace. This holding by the ALJ imposes an unreasonable burden on employers which has never before been imposed and is contrary to prior holdings of the Commission and the courts.

The standard at issue, 29 C.F.R. § 1926.651(k)(1) requires that a competent person conduct safety inspections of excavations and surrounding work areas prior to the start of work each day and after any hazard increasing occurrence, provided employee exposure to a hazardous condition can be reasonably anticipated. If such exposure cannot be reasonably anticipated, no inspections are required. A competent person is defined at 29 C.F.R. § 1926.650(b) as "one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are . . . hazardous . . . to employees and who has authorization to take prompt corrective measures to eliminate them." Prior to the alleged violation, the Secretary had published a well-known interpretation to the standard which stated that the employer's competent person was not required to remain onsite for the entire workday, but that the competent person could come and go as needed.

The undisputed facts established that EMCON's competent person was the crew's regular supervisor, Meier, and that Meier conducted an inspection of the work area at issue just prior to the start of work on the day of the alleged violation. He did not identify any existing or predictable hazards to which the crew would be exposed during the course of their work that morning. He did not anticipate and could not have reasonably anticipated that when the crew cut into the leachate cleanout pipe to tie-in a condensate drip-leg that the cutting of the pipe would be a hazard increasing occurrence which would create a hazardous atmosphere. The Secretary did not contend that Meier's inspection did not comply with the standard or that he should have anticipated or predicted employee exposure to a hazard when the pipe was cut. After giving the crew their work instructions, he left the site to purchase gasoline for the generators, leaving a crew member in charge as "acting foreman." The acting foreman, Diloreti, was not a competent person within the meaning of the standard. He was just a crew member who had a great deal of experience making tie-ins. Meier was only going to be absent from the site for 30-45 minutes and reasonably did not anticipate any hazardous conditions occurring during his absence. No evidence was offered, and the Secretary did not contend, that Meier's actions were not reasonably diligent.

After Meier left the site, a hazardous atmosphere unexpectedly developed in the immediate work area, presumably as a result of cutting into the pipe. Neither Diloreti nor the other crew members were aware of the development of the hazardous atmosphere until they suddenly started passing out in rapid order, almost simultaneously. No competent person inspection was conducted after the first cut was made because neither Diloreti or the other crew

members recognized the need for an inspection and EMCON's competent person who had been trained and was capable of recognizing hazards was temporarily away from the site and also had no knowledge of a hazard increasing occurrence which would warrant another inspection. When Meier returned 30-45 minutes after leaving, the crew had all passed out, had been removed from the work area and were receiving first aid.

The Secretary issued a citation to EMCON alleging that EMCON violated the standard because it did not conduct a competent person inspection after a hazard increasing occurrence — the cutting of the pipe. Although the Secretary did not contend that prior to the stoppage of the chainsaw and the emission of the unpleasant odor the creation of a hazard was predictable, or reasonably anticipatable, she contended that these events made employee exposure to the hazardous atmosphere reasonably predictable.

The ALJ held that if Diloreti had been trained to recognize atmospheric hazards, i.e. if EMCON had trained Diloreti to be a competent person, he could have recognized the development of the hazard. She concluded EMCON's failure to provide a temporary supervisor who had been trained to recognize such hazards constituted a failure by EMCON to be reasonably diligent to discern workplace hazards. Thus, she concluded, EMCON violated the standard and had constructive knowledge of said violation.

The unavoidable consequence of the ALJ's rationale is to require a competent person on the jobsite to directly supervise the crew constantly and continuously during the entire work shift to recognize developing hazards which could not have been reasonably anticipated prior to their

development. This, however, is contrary to the Secretary's interpretation that a competent person is not required to remain onsite during the entire work shift and is not supported by the wording of the standard itself.

The Secretary's interpretation that a competent person is not required to remain on the job at all times is reasonable. Nothing in the wording of the standard requires such a continuous presence. The requirement to provide a competent person at all times would pose an extreme and unwarranted hardship on employers. The ALJ's interpretation is unreasonable and is not supported by the wording of the standard.

The ALJ's interpretation is also inconsistent with prior holdings of the courts. In *New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 109 (2d Cir. 1996), the Court reversed the Commission, holding as a matter of law that requiring employers to constantly and continually supervise its workplace would impose "a patently unworkable burden on employers." The court held that the Commission had relied on a construction of the statute that was impermissible.

This Court held in *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991), that a reviewing court should defer to the Secretary's interpretation of an ambiguous standard when the Secretary and the Commission both furnish reasonable but conflicting interpretations of the standard. By deferring to the ALJ's decision, which unreasonably required that a competent person be onsite at all times to recognize the development of a hazardous condition as soon as it developed even when the hazard could not have been reasonably anticipated or predicted prior to its development, the court

in essence deferred to the ALJ's interpretation over the Secretary's, contrary to the holdings of this Court. While the Secretary's theory of the alleged violation is not clear in light of her interpretation, her interpretation cannot be simply ignored by the ALJ in order to justify the affirmation of the citation and it cannot be ignored by the court in order to simply defer to the ALJ's decision.

The interpretation of the standard and whether a competent person was required to be onsite at all times is a legal conclusion which is entitled to review pursuant to 5 U.S.C. § 706(2)(A). Thus, the Eleventh Circuit erred by deferring to the ALJ's decision on this issue.

III. THE ELEVENTH CIRCUIT IMPROPERLY DEFERRED TO THE ALJ'S DETERMINATION THAT THE ATMOSPHERIC HAZARD COULD HAVE BEEN REASONABLY ANTICIPATED

As discussed above, EMCON contends that the ALJ's determination that the atmospheric hazard at issue could have been reasonably anticipated once the pipe was cut is a mixed question of fact and law, dominated by the legal conclusion, and should have been reviewed by the court below as a question of law, rather than a finding of fact. The ALJ's determination is based solely on three "factual" findings: the chainsaw stopping, the strong unpleasant odor and the "physical discomfort" of the crewmembers as soon as they entered the trench to make the second cut. From these scant facts, the ALJ made a huge leap of legal logic to conclude that the employees' exposure to a hazardous atmosphere could have been reasonably anticipated. The record is completely silent as to whether a reasonable person familiar with the work being performed at the landfill would anticipate

employee exposure to a hazardous atmosphere based on a strong unpleasant odor and a chainsaw not working. Meier's testimony that, as a competent person with many years of experience working in landfills, he would not have anticipated an atmospheric hazard based on an unpleasant odor or a chainsaw stopping was not disputed.

The record contains not even a scintilla of evidence to support the ALJ's finding that the chainsaw stopping was a reasonable indicator of a lack of oxygen. Rather, it contains only speculation that a lack of oxygen could have been the cause. The record as a whole compels the conclusion that no reasonable person would have concluded at the time that the chainsaw stopped because of a lack of oxygen. The subsequent event of the crew being overcome by a lack of sufficient oxygen cannot be used as a basis for concluding what a reasonable person should have known at the time. A reasonable person does not have the advantage of 20/20 hindsight. Yet, this appears to be precisely what the ALJ used in making her determination.

It is not clear to what the ALJ was referring when she found that each of the employees had suffered immediate physical discomfort upon entering the trench to make the second cut. The record is completely silent as to any physical discomfort — unless she is referring to the simple fact that the unpleasant odor was unpleasant. Very quickly after entering the trench to make the second cut, the employees started passing out, but by this time it was too late for Diloreti to do anything because he too was unconscious.

In *New England Tel. & Tel. Co. v. Secretary of Labor*, 589 F.2d 81, 82 (1st Cir. 1978), the court considered the question of whether the employer had taken reasonable steps

to protect its employees in light of the Secretary's contention that the employer should have anticipated the possibility that another contractor might remove protective filters. The court held that the burden of care urged by the Secretary was "so unrealistic as to be unreasonable as a matter of law." The court noted that the undisputed evidence established that the employer's supervisor had inspected the worksite the day prior to the alleged violation and found nothing that would create any reasonable apprehension that a hazard would develop. The court concluded, "On this evidence we hold, as a matter of law, that petitioner has established . . . [it's defense]."

EMCON contends that the issue of reasonableness is a legal conclusion which is subject to review pursuant to the standard set forth at 5 U.S.C. § 706(2)(A), which the lower court did not perform. EMCON further contends that the ALJ's factual findings relevant to this conclusion were not supported by substantial evidence on the record considered as a whole. By erroneously deferring to the ALJ's unsupported "factual" findings which she used as the basis for her conclusion that employee exposure to a hazardous atmosphere should have been reasonably anticipated and failing to review the ALJ's determination of reasonable anticipation pursuant to 5 U.S.C. § 706(2)(A), the court denied EMCON an effective and meaningful review of the ALJ's decision and order.

IV. THE ELEVENTH CIRCUIT IMPROPERLY DEFERRED TO THE ALJ'S DETERMINATION THAT EMCON HAD KNOWLEDGE OF THE PRESENCE OF THE ALLEGED VIOLATION

It is well-settled that before an employer can be found liable for a violation of an OSHA standard, the Secretary must prove that the employer knew, or with the exercise of reasonable diligence could have known, of the presence of the violation. This requirement is based on the language contained in 29 U.S.C. § 666(k), but has been held to be equally applicable to all alleged violations — not just those alleged to be serious in nature. If an employer had no actual knowledge of the violative condition, but could have known had he been reasonably diligent, the employer is said to have had constructive knowledge of the condition. The requirement that the employer must be shown to have either actual or constructive knowledge of the presence of the violation is based on the principle that employers are not strictly liable for violations of the Secretary's standards, but rather are only accountable for violations which they could reasonably prevent. If the employer did not have actual knowledge of the presence of the violation and could not have known of its presence through the exercise of reasonable diligence, no violation is deemed to have occurred. The supervisor's knowledge is imputed to the employer. *See Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Com.*, 528 F.2d 564, 570 (5th Cir. 1976); *Brennan v. Occupational Safety & Health Review Com.*, 511 F.2d 1139, 1143 (9th Cir. 1975); *Carlisle Equip. Co. v. United States Secretary of Labor*, 24 F.3d 790, 793 (6th Cir. 1994); *Secretary of Labor v. Southwestern Bell Tel. Co.*, 19 O.S.H. Cas. (BNA) 1097, 1098 (OSHRC No. 98-1748, 2000); *Pride Oil Well Service*, 15 O.S.H. Cas. (BNA) 1809 (OSHRC No. 87-692, 1992).

The ALJ found that EMCON had constructive knowledge based on the fact that the acting foreman, Diloreti, had not been trained to recognize atmospheric hazards, i.e. had not been trained as a competent person. Thus, in effect, the ALJ held that unless an employer provides a competent person to constantly and continually monitor and supervise its workplace in order to detect the occurrence of any unpredictable hazards as they develop, the employer is not being reasonably diligent and will be deemed to have constructive knowledge of any hazard which occurs regardless of whether the employer could have reasonably foreseen said occurrence.

For the reasons stated above, such a requirement is patently unreasonable and contrary to existing law. It is unreasonable, as a matter of law, to require an employer, who provides a fully trained competent person to supervise a crew of four employees, to provide another fully trained competent person as a temporary replacement supervisor when the regular supervisor leaves the worksite for 30-45 minutes after inspecting the work area and reasonably not anticipating that any hazards will develop during his absence. Yet, the ALJ held that EMCON's failure to do just that was a failure to be reasonably diligent.

Moreover, the first indication of a hazardous atmosphere was when the first crew member, Garno, passed out. Even if Diloreti could have reasonably anticipated the presence of the hazard when Garno passed out, there was insufficient time between the time when Garno passed out and when Diloreti also passed out for Diloreti to have taken any corrective action whatsoever. Imputing knowledge to EMCON based on Diloreti's knowledge acquired only when Garno passed out, just seconds before Diloreti passed out, is

unreasonable on its face as a matter of law and fact, and renders EMCON strictly liable for conditions of which EMCON had no prior knowledge and could not have reasonably prevented.

It is well-established that the duration of a violative condition is a factor in determining employer knowledge and whether the employer can be found to be accountable for the violative condition. *See Secretary of Labor v. Williams Enterprise, Inc.*, 10 O.S.H. Cas. (BNA) 1260 (OSHRC No. 16184, 1981); *Secretary of Labor v. Daniel Construction Co.*, 10 O.S.H. Cas. (BNA) 1254 (OSHRC No. 80-1224, 1981).

For the reasons set forth above, the determination of reasonableness is primarily a legal determination and should be subject to the standard of review set forth at 5 U.S.C. § 706(2)(A). The ALJ's determination that EMCON was not reasonably diligent because it had not trained Diloerti to, in essence, be a competent person is patently unreasonable as a matter of law and subject to review pursuant to 5 U.S.C. § 706(2)(A). Thus, the Eleventh Circuit erred by failing to provide the required review of the ALJ's determination.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

CARL B. CARRUTH
McNAIR LAW FIRM, P.A.
1301 Gervais Street
Suite 1800
Columbia, SC 29201
(803) 799-9800

Counsel for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MARCH 13, 2007

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 06-11719

EMCON/OWT, INC.,

Petitioner,

versus

SECRETARY OF LABOR, THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

March 13, 2007

Before DUBINA and WILSON, Circuit Judges, and CORRIGAN,* District Judge.

PER CURIAM:

On February 15, 2004, one worker died and three others were injured at the Okeechobee Landfill in Okeechobee, Florida. These workers were employees of the Petitioner, EMCON/OWT, Inc., which was cited for a "serious" OSHA violation as

* Honorable Timothy J. Corrigan, United States District Judge for the Middle District of Florida, sitting by designation.

a result of this accident. An Administrative Law Judge conducted a full hearing on the citation and affirmed one of the citation items (Item 3), 29 C.F.R. § 1926.651(k)(1), and assessed a penalty of $6,300.00. The ALJ's decision became the final decision of the Occupational Safety and Health Review Commission (OSHRC). Petitioner seeks review of that decision in this Court. 29 U.S.C. §§ 659(c), 660(a) and 661(j).

"To prove a violation of an OSHA standard, the Secretary [of Labor] must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions." *Secretary of Labor v. Southwestern Bell Tele. Co.*, 19 BNA OSHC 1097, 1098, 2000 WL 1424806 (OSHRC No. 98-1748, 2000).

The Commission's decisions are entitled to considerable deference on appellate review. The Occupational Safety and Health Act itself provides "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U.S.C. § 660(a). "Substantial evidence is more than a scintilla and is such relevant evidence as a reasonable person would accept as adequate to support a conclusion." *Fluor Daniel v. Occupational Safety and Health Review Comm'n*, 295 F.3d 1232, 1236 (11th Cir.2002) (citations omitted). "We are mindful that we do not review the record to draw our own conclusions that we then measure against an administrative agency; rather, we must consider *all* of the evidence when drawing our conclusions about the reasonableness of an agency's findings of fact." *Schering-Plough Corp. v. F.T.C.*, 402 F.3d

1056, 1063 (11th Cir.2005) (emphasis added). "Moreover, the legal determinations of an agency like the OSHRC are to be overturned only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Fluor Daniel*, 295 F.3d at 1236; 5 U.S.C. § 706(2)(a).

After considering the briefs and hearing record and conducting oral argument, we find this to be a close case. However, given the deference which must be accorded the Commission's decision, we will not disturb it.

AFFIRMED.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES OF AMERICA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION DOCKETED DECEMBER 15, 2005

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

OSHRC Docket No. 04-1406

Secretary of Labor,

Complainant,

v.

EMCON/OWT, Inc.,

Respondent.

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

EMCON/OWT, Inc., contests a citation issued by the Secretary on July 30, 2004. The citation resulted from an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Robert Chadwick. Chadwick inspected EMCON's worksite at the Okeechobee Landfill in Okeechobee, Florida, following a fatal accident there. On February 19, 2004, a crew of four

Appendix B

EMCON employees cut into a leachate clean-out pipe, which released an odorous gas. Two of the crew members passed out and a third, Kenny Warne, died from asphyxiation.

The Secretary charges EMCON with violating three sections of the § 1926.651 excavation standard: § 1926.651(g)(1)(ii), § 1926.651(g)(1)(iv), and § 1926.651(k)(1), items1, 2, and 3 respectively.

EMCON contends the Secretary failed to establish each of the cited items. The undersigned heard the case on February 16 and 17, 2005, in Fort St. Lucie, Florida. The parties submitted post-hearing briefs.

For the reasons discussed below ENICON was not in violation of §§ 1926.651(g)(1)(ii) and (iv). Items 1 and 2 are vacated. EMCON was in violation of § 1926.651(k)(1). Item 3 is affirmed

Issues

The issues are:

(1) Item 1— Did EMCON violate § 1926.651(g)(1)(ii) by failing to take adequate precautions to prevent employee exposure to atmospheres containing less than 19.5 percent oxygen?

(2) Item 2— Did EMCON violate § 1926.651(g)(1)(iv) by failing to conduct testing as often as necessary to ensure the atmosphere was safe when controls intended to reduce the level of atmospheric contaminants were used?

Appendix B

(3) Item 3—Did EMCON violate § 1926.651(k)(1). by failing to have a competent person inspect the excavation for evidence of a situation that could result in a hazardous atmosphere?

Factual Background

EMCON constructs landfills and installs gas collection systems and leachate management systems. Okeechobee Landfill for Waste Management, Inc. (Waste Management), hired EMCON to expand its existing landfill gas extraction system. The Okeechobee Landfill is perhaps the second largest landfill in the United States. It has a capacity of 145,000,000 cubic yards of space and a site life of approximately 80 years. Landfill users may dump 10,000 to 12,000 tons of garbage a day at Okeechobee.

Landfill contractors lay landfills out in cells. They line the cells with high density polyethylene (HDPE). The Okeechobee Landfill's natural ground level is approximately 50 feet above sea level. Its permit allows the garbage to be filled to 227 feet above sea level. Users of the landfill deposit the garbage in layers. Contractors must install active gas collection systems as the cells fill up close to the grade or to their permitted height.

In early 2004, EMCON had replaced a header line to the gas collection facility and tied in new gas wells with drip legs and condensate lines back to clean-out lines on the cell. Header lines are larger the closer they are to the methane gas flare and smaller the farthest from the gas flare. These header lines act as vacuum lines for the landfill to the gas main. As

the garbage in the landfill cells deteriorates, it generates methane, an odorless gas. The header lines are necessary to pull the methane gas produced by the deterioration of the garbage in the landfill cells.

Lighter than breathable air, methane gas rises over time. Wells located around the landfill vacuum the methane into gas headers to a central location where it is burned off.

Leachate is rainwater leached through the active garbage area. Leachate clean-out lines drain leachate to the landfill's sump area. Landfill contractors install the leachate clean-out lines through the middle of each cell prior to any garbage being deposited. Gravel and a layer of sand 2 feet deep cover the clean-out pipes so that garbage does not come in contact with the pipes, The leachate percolates through the sand and gravel into the collecting lines. There are approximately 1,400 feet of leachate clean-out lines, designed with a 2 percent fall, throughout the landfill. The pipes are perforated in active waste areas so leachate can drain into them.

On February 19, 2004, EMCON's work crew was scheduled to do the final tie–in for the gas extraction system. The crew members were supervisor Johnny Meier, foreman Troy Diloreti, and laborers or field techs Billy Seaborn, Dana Garno, and Kenny Warne. The previous day the crew members had excavated a trench, exposing the leachate clean-out pipe into which they needed to cut. The trench was less than 4 feet in depth.

Meier left the site to get gas and supplies, leaving Troy Diloreti as acting foreman. Seaborn, using a gasoline-

powered chainsaw, cut into the pipe. The pipe released an odorous gas and the chainsaw stopped working. Seaborn exited the trench and went to the job trailer to retrieve a Saws-All electric saw. He was gone for 15 to 20 minutes. When he returned, he re-entered the trench. Instead of cutting into the pipe, Seaborn commented on the foul odor and again exited the trench. Diloreti then entered the trench prepared to make the cut, but he too stopped short and commented on the odor. Warne expressed impatience with his co-workers and entered the trench. He bent downto cut into the pipe, but immediately stood up and said, "Whew." (Tr. 77). Gamo jumped into the trench, bent over the pipe, stood up, and said, "Something is not right." He then passed out (Tr. 77). Seaborn went to help Garno out of the trench. Diloreti looked at Warne and saw he was bleary-eyed and his legs were buckling. Diloreti went over to pull Warne out of the trench but passed out as he was doing so.

A Waste Management operations manager radioed Waste Management district manager Matthew Orr and informed him men were down on the south side of cells 17 and 18. When Orr arrived at the site, he saw the four crew members. Two of them, including Warne, were unconscious. Garno was vomiting and Warne was foaming at the mouth. All were transported to a hospital. Warne died either in transit or at the hospital.

Daryl Lewis was a detective in charge of the crime scene unit for the Okeechobee County Sheriff's Office at the time of the accident. He photographed the site where the EMCON crew was stricken. Dr. Charles Albert Diggs was the Associate Medical Examiner for Okeechobee County. He performed

an autopsy on Warne and concluded the cause of death was asphyxiation due to "acute hydrocarbon (methane) inhalation" (Exh. C-2). Compliance officer Chadwick arrived at the Okeechobee landfill on February 20, the day after the accident. He observed the site and took photographs. He interviewed Waste Management personnel and the EMCON employees. Based upon Chadwick's investigation, the Secretary issued the citation that gave rise to this proceeding.

Discussion

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwestern Bell Telephone Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

The Secretary alleges any violations committed by EMCON were serious. Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violation.

> [T]he Secretary need not establish that an accident is likely to occur in order to prove that the violation is serious. Rather [s]he must show that "an accident is possible and there is a substantial probability that death or serious physical harm

> could result from the accident." *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324, 1991 CCH P29,500, p. 39,813 (No. 86-351, 1991)[.]

Flinteo, Inc., 16 BNA OSHC 1404, 1405 (No. 92-1396, 1993).

Items 1 and 2:
Alleged Serious Violations of §§ 1926.651(g)(1)(ii) and (iv)

Item 1 alleges a violation of § 1926.651(g)(1)(ii).[1] The citation states:

> For the work site located at the Okeechobee Landfill, at the leachate clean out located at the south end of cells #17 and #18. On 2/19/04 four employees were in the process of cutting into the eight (8) inch High Density Polyethylene (HDPE) leachate collection pipe that was located in an excavation which was approximately three (3) feet deep. Adequate precautions were not taken to protect the employees from a hazardous methane atmosphere which escaped from the cut in the leachate pipe, and accumulated within the

1. The standard requires: Adequate precautions shall be taken to prevent employee exposure to atmospheres containing less than 19.5 percent oxygen and other hazardous atmospheres. These precautions include providing proper respiratory protection or ventilation in accordance with subparts D and E of this part respectively.

excavation. The employees were overcome by the hazardous methane atmosphere.

Item 2 alleges a violation of § 1926.651(g)(1)(iv).[2] The citation states:

For the work site located at the Okeechobee Landfill, at the leachate clean out located at the south end of cells #17 and #18. On 2/19/04 employees were in the process of cutting into the eight (8) inch High Density (HDPE) leachate collection pipe that was located in an excavation which was approximately three (3) feet deep. After the initial cut was made into the leachate pipe, an atmosphere developed in the excavation which caused adverse effects to the employees. The excavation was vacated for a period of time so that the natural air movement at the work area could air-out, or ventilate, the excavation. Employees were allowed to go back into the excavation without conducting any air sampling, or exposure monitoring, to detect the presence of the reasonably expected hazardous atmosphere that may still be present in the excavation, or to determine the actual level of the hazardous atmosphere that may be present. As a result of the failure to conduct the necessary air sampling, or exposure monitoring, the employees working

2. The standard requires: When controls are used that are intended to reduce the level of atmospheric contaminants to acceptable levels, testing shall be conducted as often as necessary to ensure that the atmosphere remains safe.

in the excavation were overcome by a hazardous methane atmosphere.

1. *Application of Standards*

Section 1926.651 is captioned "Specific excavation requirements." Section 1926.651(g) is captioned "*Hazardous atmospheres,*" Section 1926.651(g)(1)(i) provides:

> Where oxygen deficiency (atmospheres containing less than 19.5 percent oxygen) or a hazardous atmosphere exists or could reasonably be expected to exist, such as in excavations in landfill areas or excavations in areas where hazardous substances are stored nearby, the atmospheres in the excavation shall be tested before employees enter *excavations greater than 4 feet* (1.22 in) in depth (emphasis added),

Immediately following this subparagraph are § 1926.651(g)(1)(ii), (ii), and (iv). EMCON argues §§ 1926.651(g)(1)(i) through (g)(1)(iv) must be read as a whole to properly understand the context. Under this interpretation, subparagraphs (g)(1)(ii) through (g)(1)(iv) apply only if the requirements of subparagraph (g)(1)(i) apply to the cited conditions. Section 1926.651(g)(1)(i) applies only to excavations greater than 4 feet in depth. EMCON argues the three subparagraphs that follow also apply only to excavations greater than 4 feet in depth. Estimates of the depth of the excavation at issue vary, but none of them exceeds 4 feet, nor does the Secretary contend the excavation was deeper than 4 feet.

Appendix B

The Secretary calls EMCON's argument "strained reasoning" (Secretary's brief, p. 15) but does not otherwise refute it.

Reading § 1926.651(g)(1) in its entirety supports EMCON's argument. Only certain excavations need to be tested for hazardous atmospheres—those in landfill areas or in areas where hazardous substances are stored nearby, for example. Section 1926.651(g)(1)(i) requires testing for these excavations, where hazardous atmospheres could reasonably be expected to exist, if they are greater than 4 feet in depth. Section 1926.651(g)(1)(ii) requires the employer to take adequate precautions "to prevent employee exposure to atmospheres containing less than 19.5 percent oxygen and other hazardous atmosphere." Section 1926.651(g)(1)(iv) requires the employer to conduct additional testing when controls are used to reduce the level of atmospheric contaminants. Unlike § 1926.651(g)(1)(i), §§ 1926.651(g)(1)(ii) and (iv) do not refer to areas where a hazardous atmosphere could reasonably be expected to exist; they address areas where the hazardous atmosphere apparently is known to exist. Section 1926.651(g)(1)(ii), thus, presumes testing has already established the atmosphere is hazardous. The ordering of the subparagraphs presents a logical progression. If testing establishes a hazardous atmosphere exists, then adequate precautions are required. If testing establishes a hazardous atmosphere exists and controls are used, then additional testing is required.

The Secretary contends the subparagraphs can be read in isolation. If her reading were correct, the employer would first be required to conduct testing in order to determine

whether it had to take the additional steps outlined in subparagraphs (ii) through (iv). This interpretation renders § 1926.651(g)(1)(i) meaningless. The alternative would be to comply with the requirements of subparagraphs (ii) through (iv) regardless of testing, an approach explicitly rejected in the preamble to § 1926.651 (54 F. R. 45894, 45920 (1989)):

> OSHA received six comments and input from ACCSH [Advisory committee on Construction Safety and Health] on this requirement. Two commenters [Exs. 4-25 and 4-67] objected to the requirement for testing the atmosphere, noting that the gas industry normally tests for hazardous atmospheres. Both commenters also contended respiratory protection or ventilation should be permitted in lieu of testing. OSHA notes that respiratory protection or ventilation is required by § 1926.651(g)(1)(ii) of this final rule, and the requirement for testing establishes what, if any, precautions or additional precautions are necessary. If an employer chooses to provide adequate employee protection in accordance with the appropriate regulations as a matter of procedure, the failure to test would be de minimis.

According to the preamble, use of adequate precautions required by § 1926.651(g)(1)(ii) is contingent upon the establishment, by testing, of a hazardous atmosphere. Because testing is not required in excavations less than 4 feet in depth, §§ 1926.651(g)(1)(ii) through (iv) do not apply to excavations less than 4 feet in depth.

Appendix B

The excavation at issue was less than 4 feet in depth. Therefore, §§ 1926.651(g)(1)(ii) and (iv) do not apply to it. Items 1 and 2 are vacated.

Item 3: Alleged Serious Violation of § 1926.651(k)(1)

Item 3 alleges a violation of § 1926.651(k)(l)[3]

> For the work site located at the Okeechobee Landfill, at the leachate clean out located at the south end of cell #17 and #18. On 2/19/04 employees were in the process of cutting into the eight (8) inch High Density Polyethylene (HDPE) leachate collection pipe that was located in an excavation which was approximately three (3) feet deep. After the initial cut was made into the leachate pipe, an atmosphere developed in the excavation which caused adverse effects to the employees. The excavation was vacated for a period of time so that the natural air movement at the work area could air-out, or ventilate, the excavation. At this time a competent person did

3. The standard requires: Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

not stop the work in the excavation and conduct, or arrange to have the appropriate person conduct, air sampling to determine what hazardous atmosphere may be present, and what levels of that hazardous atmosphere were present. After the air-out period it was assumed that it would be safe to reenter the excavation and employees were allowed to go back into the excavation without conducting any air sampling, or exposure monitoring, to detect the presence of the reasonably expected hazardous atmosphere that may still be present in the excavation. As the result of a competent person's failure to recognize the possible hazardous working condition, and failure to conduct the necessary air sampling, and failure to initiate the appropriate corrective actions, the employees that reentered the excavation were overcome by a hazardous methane atmosphere.

1. Application of Standard

Although the excavation at issue was less than 4 feet in depth, there is no question it was an excavation as defined by § 1926.650(b): "[A]ny man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." Section 1926.651(k)(1) applies to the excavation made to expose the leachate pipe.

2. Noncompliance with Terms of Standard

The Secretary considers Diloreti to be EMCON's designated competent person on the site and argues he was

not qualified. EMCON considers only supervisor Meier to be its designated competent person. EMCON argues Meier conducted an inspection of the excavation the morning of February 19, 2004, before work, in compliance with § 1926.651(k)(1). The standard does not require the competent person to remain on site for the entire workday. At the time Meier left the site to get supplies, EMCON argues, he had complied with § 1926.6510(k).

Section 1926.650(b) defines "competent person" as "one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." Neither the definition standard nor the cited standard refers to the competent person as "designated." Thus, the formal designation assigned an employee is not as significant as the employee's qualifications and authority. EMCON designated Meier, supervisor, as the competent person, but it was Diloreti, as acting foreman, who was in the position of authority when an inspection was required.

EMCON's focus is on the first two sentences of the standard, requiring an inspection prior to the start of work, which Meier conducted. But the Secretary makes it clear in the citation the alleged violation occurred when a competent person failed to conduct an inspection of the excavation *after* the crew cut into the leachate pipe. It is the last two, not the first two, sentences of § 1926.651(k)(1) that are at issue:

> Inspections shall also be made after every rainstorm or other hazard increasing occurrence.

Appendix B

These inspections are only required when employee exposure can be reasonably anticipated.

The hazard increasing occurrence in this instance was the cut made in the leachate pipe. The cut released some gas (the Secretary speculates it was methane, but this was never conclusively established) into the immediate atmosphere, causing irritation, and eventually asphyxiation, in the crew members. Section 1926.651(k)(1) requires an inspection "when employee exposure can be reasonably anticipated." Reasonable anticipation of employee exposure was raised by three incidents over a span of approximately 20 minutes: the gas chain-saw stopped, indicating a lack of oxygen in the atmosphere; a strong, unpleasant odor arose from the leachate pipe; and each crew member suffered immediate physical discomfort upon entering the excavation to make the second cut. These incidents were, all the witnesses agreed, unusual in their experience. Diloreti knew there were gas meters in the truck. Retrieving the Saws-All had already delayed work on the leachate pipe. Testing the atmosphere with a gas meter would have been the reasonable action to take by Diloreti, as acting foreman.

EMCON cannot escape the requirements of the second part of § 1926.651(k)(1) by claiming its competent person was off site after making the first required inspection. While the standard does not require a competent person's constant presence on site, it does require a competent person to conduct an inspection after a hazard increasing occurrence. This was not done in the present case.

Appendix B

Diloreti had worked for EMCON for ten and a half years at the time of the hearing (Tr. 245). In the month and a half EMCON had been on the Okeechobee site prior to Warne's death, Meier had designated Diloreti as acting foreman at least once a week (Tr. 257-258). Diloreti testified he had never received competent person training, he only vaguely understood the term "competent person," and it had never occurred to him to test the excavation with a gas meter after the crew cut the leachate pipe (Tr. 259-263).

> Under Commission precedent, a person is found to be competent when he makes an inspection in a competent manner and makes a reasonable determination that the condition is safe. . . . [E]xperience alone does not qualify the designated employee as a "competent person."

Superior Masonly Builders, 20 BNA OSHC 1182 (No. 96-1043, 2005). Where inspections are insufficient to identify a recognizable hazard, the employer is in noncompliance with the requirement that inspections be conducted by a competent person. *DiGioia Brothers Excavating*, 17 BNA OSHC 1181, 1184 (No. 92-3024, 1995).

Diloreti was not qualified to act as a competent person. He was unable to identify a recognizable hazard when his crew members showed signs of physical discomfort when exposed to gas released by the leachate pipe. No competent person conducted an inspection of the excavation following the hazard increasing occurrence. EMCON failed to comply with the terms of the standard.

Appendix B

3. Employee Exposure

Four EMCON employees were exposed to the hazard created when EMCON failed to have a competent person conduct an inspection of the excavation following a hazard increasing occurrence. Kenny Warne died from exposure to the hazardous condition. The other three crew members present were hospitalized. The Secretary has established employee exposure to the hazardous condition.

4. Knowledge

The Secretary contends EMCON had constructive knowledge of the violation of § 1926.651(k)(1). Constructive knowledge is shown if the employer could have known of the violative condition with the exercise of reasonable diligence. Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, and to take measures to prevent the occurrence of the violation. *Pride Oil Well Service,* 15 BNA OSHC 1809 (No. 87-692, 1992).

Diloreti testified that, along with Meier, he considered himself qualified as a competent person. When asked why, Diloreti responded (Tr. 263):

> I felt safe as far as, like, you know, my digging, my benching, knowing if there was a problem or whatnot. I mean, in the ten years that I had been there, I went from a laborer to a technician to an

> operator to a foreman. I feel that I was competent enough, you know, to succeed with my career.

Diloreti said nothing regarding hazardous atmospheres. As noted, EMCON did not provide him with competent person training. EMCON was not reasonably diligent in training its employees, especially employees who took on supervisory roles, to recognize potentially hazardous situations and to take steps to prevent employee exposure to a hazardous atmosphere. Diloreti's knowledge of the foul smell and of his crew members' reaction to it are imputed to EMCON. *Globe Contractors, Inc. v Hern,* 132 F.3d 367, 373 (7th Cir. 1997).

The Secretary has established a serious violation of § 1926.651(k)(1).

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

EMCON employs more than 250 employees (Tr. 150-151). The company had no history of violations in the three years prior to the inspection at issue (Tr. 151). EMCON demonstrated good faith throughout the proceedings.

The gravity of the violation is high. Failure to comply with § 1926.651(k) and to test the atmosphere in this instance likely contributed to the death of an employee.

It is determined the appropriate penalty for this item is $6,300.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of the citation, alleging a violation of § 1926.651(g)(1)(ii), is vacated and no penalty is assessed;

2. Item 2 of the citation, alleging a violation of § 1926.651(g)(1)(iv), is vacated and no penalty is assessed; and

3. Item 3 of the citation, alleging a violation of § 1926,651(k)(1), is affirmed, and a penalty of $6,300.00 is assessed.

/S/ NANCY J. SPIES
NANCY J. SPIES
Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 14, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-11719-DD

EMCON/OWT, INC.,

Petitioner,

versus

SECRETARY OF LABOR, THE OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION,

Respondents-Appellees.

Petition for Review of an Order of the Occupational Safety and Health Review Commission

BEFORE: DUBINA and WILSON, Circuit Judges, and CORRIGAN,* District Judge.

PER CURIAM:

The petition for rehearing filed by Petitioner, EMCON/OWT, Inc. is DENIED.

---

* Honorable Timothy J. Corrigan, United States District Judge for the Middle District of Florida, sitting by designation.

Appendix C

ENTERED FOR THE COURT:

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

APPENDIX D — RELEVANT CODES OF FEDERAL REGULATION

§ 1926.650 Scope, application, and definitions applicable to this subpart.

(a) *Scope and application.* This subpart applies to all open excavations made in the earth's surface. Excavations are defined to include trenches.

(b) *Definitions applicable to this subpart.*

* * *

Competent person means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

* * *

Excavation means any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal.

* * *

Hazardous atmosphere means an atmosphere which by reason of being explosive, flammable, poisonous, corrosive, oxidizing, irritating, oxygen deficient, toxic, or otherwise harmful, may cause death, illness, or injury.

* * * *

Appendix D

§ 1926.651 Specific excavation requirements.

* * *

(k) *Inspections.* (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

(2) Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

(l) Walkways shall be provided where employees or equipment are required or permitted to cross over excavations. Guardrails which comply with § 1926.502(b) shall be provided where walkways are 6 feet (1.8 m) or more above lower levels.

No. 07-198

In the Supreme Court of the United States

EMCON/OWT, INC., PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JONATHAN L. SNARE
Acting Solicitor of Labor
JOSEPH M. WOODWARD
Associate Solicitor
MICHAEL P. DOYLE
Counsel for Appellate Litigation
EDWARD D. SIEGER
JONATHAN R. HAMMER
Attorneys
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the court of appeals correctly affirmed a decision by an administrative law judge under the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, in light of the substantial evidence standard of review applicable to an agency's findings of fact and the arbitrary and capricious standard otherwise applicable to an agency's determinations.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Atlantic & Gulf Stevedores v. *OSHRC*, 534 F.2d 541 (3d Cir. 1976) 6
Atlas Roofing Co. v. *OSHRC*, 518 F.2d 990 (5th Cir. 1975), aff'd on other grounds, 430 U.S. 442 (1977) 7
Consolidated Edison Co. v. *NLRB*, 305 U.S. 197 (1938) 8
Donovan v. *General Motors Corp.*, 764 F.2d 32 (1st Cir. 1985) 7
Dunlop v. *Rockwell Int'l.*, 540 F.2d 1283 (6th Cir. 1976) 7
Electric Smith, Inc. v. *Secretary of Labor*, 666 F.2d 1267 (9th Cir. 1982) 6
Martin v. *OSHRC*, 947 F.2d 1483 (11th Cir. 1991) 7
Pennsylvania Dep't of Corr. v. *Yeskey*, 524 U.S. 206 (1998) 8
Pennsylvania Power & Light Co. v. *OSHRC*, 737 F.2d 350 (3d Cir. 1984) 7
Puerto Rico Aqueduct & Sewer Auth. v. *EPA*, 35 F.3d 600 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (1995) 7

Cases—Continued: Page

United States v. *Johnston*, 268 U.S. 220 (1925) 10
USPS v. *Gregory*, 534 U.S. 1 (2001) 8

Statutes, regulations and rule:

Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* 2
29 U.S.C. 654(a) 2
29 U.S.C. 655 2
29 U.S.C. 658 4
29 U.S.C. 660(a) 5
29 U.S.C. 661(j) 5
29 U.S.C. 666(k) 4, 6, 7
5 U.S.C. 706(2)(A) 5, 6, 7, 8, 9
29 C.F.R.:
Section 1926.650(b) 2
Section 1926.651(g)(1)(ii) 4
Section 1926.651(g)(1)(iv) 4
Section 1926.651(k)(1) ..... *passim*
Section 1926.651(k)(2) 2
Sup. Ct. R. 10 10

In the Supreme Court of the United States

No. 07-198

EMCON/OWT, INC., PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a- 3a) is not published in the *Federal Reporter* but is reprinted in 224 Fed. Appx. 875. The decision and order of the administrative law judge (ALJ) of the Occupational Safety and Health Review Commission (Pet. App. 4a-22a) is reported at 21 O.S.H. Cas. (BNA) 1498.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2007. A petition for rehearing was denied on May 14, 2007 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on August 13, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, requires a covered employer to furnish to each of his employees a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to the employees, and to comply with occupational safety and health standards promulgated by the Secretary of Labor (Secretary). 29 U.S.C. 654(a); see 29 U.S.C. 655 (Secretary's authority to promulgate standards). Among the Secretary's standards is a requirement that employers engaged in excavation or trenching work perform daily inspections of excavations for evidence of a situation that "could result in [among other things] * * * hazardous atmospheres[] or other hazardous conditions." 29 C.F.R. 1926.651(k)(1).

The standard provides that a "competent person" must inspect the excavation "prior to the start of work and as needed throughout the shift." 29 C.F.R. 1926.651(k)(1). In particular, such an inspection is required after every "hazard increasing occurrence * * * when employee exposure can be reasonably anticipated." *Ibid.* Where the competent person finds evidence of a hazardous atmosphere or other hazardous conditions, exposed employees must "be removed from the hazardous area until the necessary precautions have been taken to ensure their safety." 29 C.F.R. 1926.651(k)(2).

A "competent person" is "one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are * * * hazardous * * * to employees, and who has authorization to take prompt corrective measures to eliminate them." 29 C.F.R. 1926.650(b).

2. Petitioner performs services involving the construction and maintenance of landfills. It was responsible for installing leachate collection systems and expanding gas extraction systems in the Okeechobee Landfill in Florida. Pet. App. 6a. Leachate is rainwater that leaches through garbage in the landfill and is collected in pipes in the landfill and then removed from the landfill for treatment. *Id.* at 7a; see Pet. 4. Gas extraction involves the removal of methane, an odorless gas produced by the deterioration of garbage in the landfill. Pet. App. 6a-7a.

In early 2004, petitioner had replaced a gas collection line and connected (tied in) new gas collection systems to leachate clean-out lines. Pet. App. 6a. On February 19, 2004, five of petitioner's employees were set to do the final tie-in for the gas collection system. *Id.* at 7a. The work involved cutting into a leachate clean-out pipe in an excavated trench. *Ibid.*

The work crew's supervisor (Meier) inspected the work site, then left to pick up supplies. See Pet. App. 7a, 17a. An acting foreman (Diloreti) was left in charge. *Id.* at 7a. While the acting foreman was in charge, one of the workers (Seaborn) cut into the pipe with a gas-powered chainsaw. *Id.* at 7a-8a. The pipe released an odorous gas, and the chainsaw stopped working. *Id.* at 8a. Seaborn then left to get an electric saw. *Ibid.*

About 15 to 20 minutes later, Seaborn returned with the electric saw, entered the excavation, and immediately exited the excavation, remarking on a foul odor. Pet. App. 8a. Diloreti then entered the excavation but also immediately exited, commenting on the bad odor. *Ibid.* Another employee (Warne) then entered the excavation, leaned over to cut the pipe, and immediately stood back up and said "Whew." *Ibid.* Finally, the re-

maining crew member (Garno) entered the excavation and leaned down to cut the pipe, stood back up, and said, "Something is not right." *Ibid.* He then passed out. Seaborn went to help Garno, and Diloreti noticed that Warne's legs were buckling. Diloreti went to pull Warne out of the trench, but passed out as he was doing so. *Ibid.* The employees were pulled from the excavation by other people working nearby and taken to a hospital for treatment. *Ibid.* Warne died either in transit or at the hospital. *Id.* at 1a-2a, 8a.

3. Following an investigation, the Secretary cited petitioner for violating the requirement in 29 C.F.R. 1926.651(k)(1) that a competent person inspect an excavation after a hazard-increasing occurrence if employee exposure can be reasonably anticipated. Pet. App. 15a-16a; see 29 U.S.C. 658.[1] The Secretary also alleged that the violation was "serious." Under 29 U.S.C. 666(k), a "serious violation" is deemed to exist if "there is a substantial probability that death or serious physical harm could result" from a condition or practice at issue "unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." *Ibid.*

a. The ALJ affirmed the citation. Pet. App. 15a-22a. The ALJ reasoned that "[t]he hazard increasing occurrence in this instance was the cut made in the leachate pipe." *Id.* at 18a. The ALJ found that "[r]easonable anticipation of employee exposure was raised by three incidents over a span of approximately 20 minutes: the

---

[1] The Secretary also cited petitioner under 29 C.F.R. 1926.651(g)(1)(ii) and (iv) for failing to take certain steps to protect employees from a hazardous atmosphere. See Pet. App. 10a-12a. The ALJ vacated those citations, *id.* at 12a-15a, and they are no longer at issue here.

gas chain-saw stopped, indicating a lack of oxygen in the atmosphere; a strong, unpleasant odor arose from the leachate pipe; and each crew member suffered immediate physical discomfort upon entering the excavation to make the second cut. These incidents were, all the witnesses agreed, unusual in their experience." *Ibid.* Under 29 C.F.R. 1926.651(k)(1), an inspection was therefore required. The ALJ further found that no inspection was made, even though the "reasonable action" for the acting foreman to have taken was to test the atmosphere with a gas meter he knew was in a truck. Pet. App. 18a.

The ALJ also determined that the violation was serious and that petitioner had constructive knowledge of the violation because it could have known of it with the exercise of reasonable diligence. Pet. App. 20a-21a. The ALJ found that petitioner was not reasonably diligent in training its employees, especially employees who took on supervisory roles, to recognize potential hazards and to take steps to prevent employee exposure to a hazardous atmosphere. *Id.* at 21a. The ALJ also imputed the acting foreman's actual knowledge of the hazardous conditions to petitioner. *Ibid.* The ALJ then assessed a penalty of $6300. *Id.* at 21a-22a.

b. The ALJ's decision became final when the Occupational Safety and Health Review Commission (Commission) denied petitioner's request for discretionary review. See 29 U.S.C. 661(j).

c. The court of appeals affirmed the ALJ's decision. Pet. App. 1a-3a. The court reasoned that Commission decisions "are entitled to considerable deference on appellate review." Under 29 U.S.C. 660(a), the Commission's findings on questions of fact are conclusive if supported by substantial evidence; and 5 U.S.C. 706(2)(A) provides that an agency's decision otherwise can be

overturned only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Pet. App. 2a-3a. The court of appeals stated that this was a "close case," but "given the deference which must be accorded the Commission's decision," the decision should be affirmed. *Id.* at 3a.

ARGUMENT

The unpublished per curiam decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Petitioner first argues that the court of appeals' decision is in conflict with decisions of other circuits on the standard of review governing the Commission's determination that the employees' exposure could be "reasonably anticipated," 29 C.F.R. 1926.651(k)(1), and that petitioner did not exercise "reasonable diligence," 29 U.S.C. 666(k). Pet. 13-15. In fact, there is no conflict among the circuits on this issue.

Several of the cases cited by petitioner stand for the general proposition that agency determinations on mixed questions of fact and law are subject to substantial evidence review when factual questions predominate, 29 U.S.C. 660(a), and to review under the standard of 5 U.S.C. 706(2)(A) when legal questions predominate.[2] See *Atlantic & Gulf Stevedores* v. *OSHRC*, 534 F.2d 541, 547 (3d Cir. 1976) (applying the Section 706(2)(A) standard to a predominantly legal question); *Electric Smith, Inc.* v. *Secretary of Labor*, 666 F.2d 1267, 1271 (9th Cir. 1982) (applying the Section 706(2)(A) standard in case

[2] Section 706(2)(A) provides that a reviewing court shall set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

where "factual findings are of limited importance * * * as compared with the conclusions of law to be drawn from them"); *Puerto Rico Aqueduct & Sewer Auth.* v. *United States EPA*, 35 F.3d 600, 604 (1st Cir. 1994) (review under Section 706(2)(A) not applied to "[m]ixed questions of law and fact * * * that * * * are fact-dominated"), cert. denied, 513 U.S. 1148 (1995).

The only three cases cited by petitioner that deal specifically with the "reasonable diligence" standard in Section 666(k) all treat an employer's actual or constructive knowledge of a violation as a question of fact subject to substantial evidence review. See *Atlas Roofing Co.* v. *OSHRC*, 518 F.2d 990, 1013 (5th Cir. 1975) (whether employer exercised "reasonable diligence" is "[e]ssentially * * * a question of fact"), aff'd on other grounds, 430 U.S. 442 (1977); *Dunlop* v. *Rockwell Int'l*, 540 F.2d 1283, 1288 (6th Cir. 1976) (same); *Martin* v. *OSHRC*, 947 F.2d 1483, 1485 (11th Cir. 1991) (same). The same is true in the First and Third Circuits. See *Pennsylvania Power & Light Co.* v. *OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984) (applying substantial evidence standard); *Donovan* v. *General Motors Corp.*, 764 F.2d 32, 35 (1st Cir. 1985) (whether employer had constructive knowledge of hazards is a question of fact reviewed for substantial evidence). Petitioner cites no case to the contrary. Nor does petitioner cite any case dealing specifically with the "reasonable anticipation" standard under 29 C.F.R. 1926.651(k)(1).

Moreover, even if there were a circuit split, this case would not be an appropriate vehicle to resolve it, for three reasons. First, the court of appeals was not asked to decide which standard of review should apply to the ALJ's determinations that employee exposure could be "reasonably anticipated" and that petitioner had con-

structive knowledge. Instead, petitioner's brief in the court of appeals merely recited the familiar rule that findings of fact are subject to substantial evidence review, and conclusions of law are subject to review under Section 706(2)(A). Pet. C.A. Br. 16-17. This Court should not consider issues that "are neither raised before nor considered by the Court of Appeals." *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) (citations omitted).

Second, the court of appeals did not clearly identify what standard of review it used. It too simply recited the rule that questions of fact are reviewed for substantial evidence and that legal determinations are reviewed under the standard of Section 706(2)(A). Pet. App. 2a-3a. It then concluded that the ALJ's decision must be upheld "given the deference which must be accorded" to it. *Id.* at 3a. Petitioner asserts that the court of appeals "presumably" reviewed the ALJ's determinations on the issues of reasonableness in this case as pure questions of fact, Pet. 13, but the court may well have reviewed them as mixed questions of fact and law.

Finally, petitioner nowhere explains why the label affixed to the court of appeals' review would make any difference in this case. Both the substantial evidence standard and the standard of Section 706(2)(A) are highly deferential to the agency. See *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938) ("[s]ubstantial evidence * * * means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *USPS* v. *Gregory*, 534 U.S. 1, 6-7 (2001) (describing "arbitrary and capricious" review as "extremely narrow"). The court of appeals here rested upon the deference owed to the Commission in upholding the ALJ's decision. Pet. App. 3a. Whether this deference

was owed under the rubric of substantial evidence or under the banner of Section 706(2)(A) is, in this case, a distinction without a difference.

2. Petitioner also argues that the ALJ misinterpreted 29 C.F.R. 1926.651(k)(1) to require that a competent person be on-site continuously, contrary to the Secretary's interpretation of that standard. Pet. 15-20. This is incorrect.

The ALJ expressly acknowledged that "the standard does not require a competent person's constant presence on site." Pet. App. 18a. However, the ALJ correctly stated that the regulation requires an inspection "as needed throughout the shift," such as after a "hazard increasing occurrence * * * when employee exposure can be reasonably anticipated." 29 C.F.R. 1926.651(k)(1); Pet. App. 15a n.3, 18a. Here, the ALJ reasoned, the cut made into the leachate pipe was a hazard increasing occurrence, and employee exposure to a hazardous atmosphere could be reasonably anticipated due to "three incidents over a span of approximately 20 minutes: the gas chain-saw stopped, indicating a lack of oxygen in the atmosphere; a strong, unpleasant odor arose from the leachate pipe; and each crew member suffered immediate physical discomfort upon entering the excavation to make the second cut." *Id.* at 18a. At that point, an inspection by a competent person was required to ensure that conditions were safe or to take corrective action to prevent employee exposure to a hazardous atmosphere. If the competent person was not on site, as petitioner claims, work should have stopped until he returned.

3. Finally, petitioner disputes the ALJ's determinations that an atmospheric hazard could reasonably have been anticipated and that petitioner had constructive

knowledge of the hazard. Pet. 15-25. Those are fact-bound questions that do not merit this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Moreover, the ALJ's determinations were correct. The ALJ reasonably determined that the toxic atmosphere could reasonably have been anticipated based on a series of events that the workers characterized as "unusual in their experience" (Pet. App. 18a): the release of an odorous gas; the sudden stoppage of the chain saw after cutting the pipe, indicating a lack of oxygen; and the physical discomfort experienced by workers in their repeated aborted attempts to enter the excavation and continue work. *Id.* at 7a-8a, 18a. Petitioner simply prefers the testimony of its supervisor, who was absent from the work site when the hazardous atmosphere developed. Pet. 21.

The ALJ also correctly determined that petitioner could have known of the hazard through the acting foreman had it been reasonably diligent in training its employees, especially those who took on supervisory roles, to identify recognizable hazards and to take steps to prevent employee exposure while awaiting inspection by a competent person. Pet. App. 20a-21a. The ALJ's decision does not amount to a requirement that a competent person be present at all times; rather, the ALJ's decision requires only that employees in supervisory roles receive training sufficient for them to be able to recognize when an inspection by a competent person is "needed [during] the shift," 29 C.F.R. 1926.651(k)(1),

due to a hazard increasing occurrence. Absent such training, the "as needed" inspections required by the standard would not take place unless the competent person happened to be on site when hazardous conditions developed.

Petitioner's claim that the acting foreman was not aware of any potential hazard until "seconds" before he passed out (Pet. 24), and therefore could not have taken any corrective action, is not supported by the evidence. The acting foreman had seen the chainsaw stop, was present when one worker exited the trench because of the bad odor, and exited the trench himself because of the bad odor. Pet. App. 8a. If he had been properly trained, he would have recognized the presence of a hazardous atmosphere and would have prevented other workers from entering the trench until a competent person could conduct an inspection.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JONATHAN L. SNARE
Acting Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor

MICHAEL P. DOYLE
Counsel for Appellate Litigation

EDWARD D. SIEGER
JONATHAN R. HAMMER
Attorneys
Department of Labor
Washington, D.C. 20210

OCTOBER 2007